Hamzah HM Saman (Amanah Raya Bhd appointed based on the order dated 17 January 2007 representing the estate of Hamzah HM Saman, deceased) & Ors v Ronald Beadle

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–37 OF 2007
KN SEGARA, SULAIMAN DAUD AND MOHD HISHAMUDIN JJCA
22 FEBRUARY 2010

Administrative Law — Exercise of administrative powers — Judicial review — Certificate issued by Director General of Income Tax preventing tax-payer from leaving Malaysia — Whether issuance of certificate open to challenge in collateral civil proceedings for damages instituted by tax-payer — Whether issuance of certificate ought to be challenged in judicial review proceedings instead — Income Tax Act 1967 s 104

Revenue Law — Income tax — Payment of tax — Employee's monies retained by employer pending assessment and payment of tax — Whether payment of assessed tax personal liability of employee or employer

Revenue Law — Income tax — Recovery by government of taxes due and payable — Recovery from persons leaving Malaysia — Certificate under s 104 of the Income Tax Act 1967 — Whether certificate issued pursuant to statutory powers and duties under the Income Tax Act 1967 — Whether issuance of certificate open to challenge in collateral civil proceedings for damages instituted by tax-payer — Whether issuance of certificate ought to be challenged in judicial review proceedings — Income Tax Act 1967 s 104

Revenue Law — Income tax — Recovery by government of taxes due and payable — Whether taxes recoverable through civil proceedings as debt due to the government — Whether court may entertain plea that tax recoverable excessive, incorrectly assessed, under appeal or incorrectly increased — Income Tax Act 1967 ss 103 & 106

The plaintiff — a British citizen — resigned from SEA Helicopters Sdn Bhd ('SEAH') on 29 December 1980, leaving a sum of RM27,943 representing income tax deductions with SEAH. SEAH duly informed the second defendant of the plaintiff's resignation. By letter dated 6 April 1981, the second defendant directed SEAH to remit a sum of RM22,778.70 from the plaintiff's money retained by SEAH towards payment of tax owed by the plaintiff. A copy

of the letter was extended to the plaintiff, clearly setting out how the computation was derived at. However, SEAH failed to remit the sum. The plaintiff refused to settle the said sum. He adopted the position that it was SEAH's responsibility to remit the amount payable out of his monies retained. On 17 December 1981, the first defendant issued a certificate under s 104 of the Income Tax Act 1967 ('the Act') preventing the plaintiff from leaving Malaysia until all tax owed by the plaintiff was paid. The plaintiff's passport was also seized the same day. On 27 May 1986, the third defendant commenced legal proceedings against the plaintiff to recover the outstanding tax. On 5 May 1987, the plaintiff paid into court a security deposit that resulted in the release of his passport. The plaintiff then sued the defendants for loss and damage suffered due to the alleged wrongful acts of the defendants. The High Court awarded the plaintiff RM3m in damages. The defendants thus appealed to the Court of Appeal. The Court of Appeal was of the view that the only relevant issue for determination was whether the first defendant had lawfully issued the certificate under s 104 of the Act on 17 December 1981.

Held, allowing the appellants' appeal with costs and dismissing the respondent's cross-appeal with no order as to costs:

(1) Personal income tax is a personal liability of the individual and not a liability of his employer. The individual who has had tax assessed must make the payment. Section 104 of the Act facilitates recovery of tax from persons leaving Malaysia, whether upon cessation of employment or otherwise (see para 8).

(2) Tax due and payable may be recovered by the government by civil proceedings as a debt due to the government under s 106(1) of the Act. In any proceedings under s 106, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under sub-ss 103(3), (4), (5), (6), (7) or (8) (see para 9).

(3) The certificate issued against the plaintiff on 17 December 1981 under s 104(1) of the Act by the first defendant, was lawful. It was issued bona fide by the first defendant in the execution of his statutory duties and powers under the Act. The first defendant had acted neither arbitrarily nor unreasonably, when he issued the certificate. The pre-requisites for the issue of the certificate were clearly satisfied. From the facts and circumstances, it was evident that the plaintiff was very likely to leave Malaysia without paying the taxes payable. The certificate could not be challenged in the plaintiff's suit. The consequences flowing from the certificate were all foreseeable and could have been easily avoided by the plaintiff from the very beginning (see paras 13–14).

(4) The plaintiff had clearly defied the tax authorities and the tax laws. He was the author of his predicament with the tax authorities through his

adamant conduct in resisting responsibility for his tax liabilities and his persistent attempts to shift blame to SEAH and/or the first or second defendants (see paras 19–20).

(5) The High Court judge had seriously misdirected herself on the facts and law when she held, inter alia, hat the first defendant had acted arbitrarily and unreasonably in issuing the certificate under s 104 of the Act (see para 31).

(6) The plaintiff's claims were totally misconceived, exaggerated and ill perceived. His intention was to rake in a windfall. In the circumstances of the case, damages were wholly unsustainable in law and in fact (see para 33).

(7) In the absence of any special circumstances, it was irregular and inappropriate for the plaintiff to challenge the exercise of a statutory power by a public officer under s 104 of the Act, in collateral proceedings for damages by a writ action in 2000, without resort to any appropriate judicial review proceedings in 1981 or 1982 relating to the certificate, within the time frame stipulated in the Rules of the High Court 1980 (see para 34).

[Bahasa Malaysia summary

Plaintif — warganegara British — telah meletakkan jawatan dari SEA Helicopters Sdn Bhd ('SEAH') pada 29 Disember 1980, meninggalkan sejumlah RM27,943 yang merupakan potongan cukai pendapatan dengan SEAH. SEAH telah memberitahu defendan kedua tentang peletakan jawatan plaintif. Melalui surat bertarikh 6 April 1981, defendan kedua telah mengarahkan SEAH untuk membayar jumlah RM22,778.70 daripada wang plaintif yang dibayar oleh SEAH untuk bayaran cukai yang terhutang oleh plaintif. Salinan surat itu telah diberikan kepada plaintif, yang jelas menyatakan bagaimana pengiraan telah dibuat. Walau bagaimanapun, SEAH telah gagal membayar jumlah itu. Plaintif enggan menyelesaikan jumlah tersebut. Dia telah mengambil pendirian bahawa ia adalah tanggungjawab SEAH untuk membayar jumlah yang perlu dibayar itu daripada wangnya yang disimpan. Pada 17 Disember 1981, defendan pertama telah mengeluarkan sijil di bawah s 104 Akta Cukai Pendapatan 1967 ('Akta') menghalang plaintif meninggalkan Malaysia sehingga semua cukai terhutang oleh plaintif dibayar. Pasport plaintif juga telah dirampas pada hari yang sama. Pada 27 Mei 1986, defendan ketiga telah memulakan prosiding undang-undang terhadap plaintif untuk mendapat balik cukai yang belum dijelaskan. Pada 5 Mei 1987, plaintif telah membayar ke mahkamah deposit sekuriti yang menyebabkan pasportnya dilepaskan. Plaintif kemudian telah menyaman defendan-defendan untuk kehilangan dan kerugian yang dialami akibat tindakan-tindakan defendan-defendan yang dikatakan salah itu. Mahkamah telah mengawardkan plaintif ganti rugi RM3 juta. Defendan-defendan dengan itu telah merayu ke

Mahkamah Rayuan. Mahkamah Rayuan berpendapat bahawa satu-satunya isu yang relevan untuk ditentukan adalah sama ada defendan pertama telah mengeluarkan sijil di bawah s 104 Akta pada 17 Disember 1981 dengan sah.

Diputuskan, membenarkan rayuan perayu dengan kos dan menolak rayuan balas responden tanpa perintah untuk kos:

(1) Cukai pendapatan peribadi adalah liabiliti peribadi individu dan bukan liabiliti majikannya. Individu yang mempunyai taksiran cukai hendaklah membuat pembayaran. Seksyen 104 Akta memudahkan cukai daripada mereka yang meninggalkan Malaysia diperoleh semula, sama ada setelah penamatan pekerjaan atau sebaliknya (lihat perenggan 8).

(2) Cukai yang kena dibayar dan perlu dibayar oleh kerajaan melalui prosiding sivil sebagai hutang yang kena dibayar kepada kerajaan di bawah s 106(1) Akta. Dalam apa-apa prosiding di bawah s 106, mahkamah tidak patut melayan apa-apa rayuan yang mana jumlah cukai yang dipohon untuk dikembalikan adalah terlalu tinggi, disalahtaksirkan, di bawah rayuan atau ditambah secara salah di bawah sub-ss 103(3), (4), (5), (6), (7), atau (8) (lihat perenggan 9).

(3) Sijil yang dikeluarkan terhadap plaintif pada 17 Disember 1981 di bawah s 104(1) Akta oleh defendan pertama adalah sah. Ia dikeluarkan secara bona fide oleh defendan pertama dalam pelaksanaan kewajipan statutori dan kuasanya di bawah Akta. Prasyarat-prasyarat untuk mengeluarkan sijil jelas telah dipenuhi. Berdasarkan fakta dan keadaan, adalah jelas bahawa plaintif besar kemungkinan akan meninggalkan Malaysia tanpa membayar cukai-cukai yang perlu dibayar. Sijil itu tidak boleh dicabar dalam guaman plaintif. Akibat yang wujud daripada sijil itu kesemuanya boleh diramal dan dengan mudah dapat dielakkan oleh plaintif dari awal lagi (lihat perenggan 13–14).

(4) Plaintif jelas telah mengingkari pihak berkuasa cukai dan undang-undang cukai. Dia sendiri telah menimbulkan kesusahan dengan pihak berkuasa cukai dan percubaan berterusannya untuk memindahkan kesalahan tersebut kepada SEAH dan/atau defendan-defendan pertama atau kedua (lihat perenggan 19–20).

(5) Hakim Mahkamah Tinggi betul-betul telah salah arah tentang fakta dan undang-undang apabila beliau memutuskan, antara lain, bahawa defendan pertama telah bertindak sewenang-wenangnya dan tidak munasabah apabila mengeluarkan sijil itu di bawah s 104 Akta (lihat perenggan 31).

(6) Tuntutan-tuntutan plaintif telah sama sekali disalah tanggap, dibesar-besarkan dan disalah anggap. Dia berniat untuk mengaut

durian runtuh. Dalam keadaan kes tersebut, ganti rugi tidak boleh diberikan sama sekali dari segi undang-undang dan fakta (lihat perenggan 33).

(7) Dalam ketiadaan apa-apa keadaan istimewa, ia adalah di luar aturan dan tidak wajar untuk plaintif mencabar pelaksanaan kuasa statutori oleh pegawai awam di bawah s 104 Akta, dalam prosiding kolateral untuk ganti rugi melalui writ tindakan dalam tahun 2000, tanpa merujuk kepada apa-apa prosiding semakan kehakiman yang sewajarnya dalam tahun 1981 atau 1982 berkaitan sijil itu, dalam tempoh masa yang ditetapkan dalam Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 34).]

Notes

For a case on recovery by government of taxes due and payable, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) para 2402.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 46–71.

For cases on payment of income tax, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2373–2378.

Legislation referred to

Income Tax Act 1967 ss 83(3), (5), 103(3), (4), (5), (6), (7), (8), 104, 104(1), 115(1), (2), 106, 106(1)

Rules of the High Court 1980

Appeal from: Civil Suit No S4(S6)–21–64 of 2000 (High Court, Kuala Lumpur)

Nik Marzuki bin Nik Mohamad (Deputy Public Prosecutor, Attorney General's Chambers) for the appellants.

Jeffrey Wong (Farahatun Najwa Paidin with him) (Jeffrey Wong, Noorul, Ho & Lim) for the respondent.

KN Segara JCA (delivering judgment of the court):

[1] The respondent ('the plaintiff'), a British citizen, started his employment with SEA Helicopters Sdn Bhd ('SEAH') on 29 February 1972. He resigned from SEAH with effect from 29 December 1980. When the plaintiff left SEAH, a total sum of RM27,943 belonging to the plaintiff, that had been deducted from his monthly salaries, was in the hands of SEAH. Pursuant to s 83(3) of the Income Tax Act 1967 ('the Act') SEAH notified the Jabatan Hasil Dalam Negeri, the second appellant (second defendant) of the plaintiff's resignation.

(Section 83(3):

Where an employer is about to cease to employ an individual who is likely to be chargeable to tax in respect of income in respect of gains or profits from the employment, the employer shall not later than one month before the cessation give written notice thereof to the Director General stating the full name and address of the individual and the expected date of cessation:

Provided that, where he is satisfied that it is reasonable to do so in the circumstances, the Director General may accept for the purposes of this subsection a notice given less than one month before the cessation or a notice given on or after the cessation:

Provided further ...)

[2] After receiving the notification from SEAH of the plaintiff's resignation, the second defendant wrote to the plaintiff on 23 February 1981 informing him that SEAH had been instructed to withhold all sums payable to the plaintiff, pending clearance from the second defendant. The plaintiff was required to notify the second defendant should there be a change of his address.

(section 83(5) of the Act states: Notwithstanding the provisions of any written law to the contrary, where *an employer has in his possession any moneys whatsoever* which are or may be payable to or for the benefit of an employee who has *ceased to be employed* by him or is about to leave Malaysia for a period of more than three months with no intention of returning, he *shall not, without the permission of the Director General, pay any part of those moneys to or for the benefit of the employee* until ninety days after the receipt by the Director General of the notice required to be given under subsection (3) or (4) as the case may be, and *if at any time the Director General directs him to pay* the full amount or a portion of those moneys towards payment of the tax payable by the employee, *he shall pay as directed*.)

(Emphasis added.)

[3] The plaintiff replied, on 5 March 1981, informing the second defendant of his residential address and that *he was awaiting the issue of a work permit for him to be employed by Eagle Aviation Services Sdn Bhd*, a company incorporated by the plaintiff. The second defendant then, on 6 April 1981, directed SEAH to remit a sum of RM22,778.70 from the amount of the plaintiff's money retained by SEAH, towards payment of tax payable by the plaintiff. At the same time, the second defendant informed SEAH that the balance remaining in their hands thereafter could be released to the plaintiff ('Segala baki yang dipegang boleh dilepaskan untuk dibayar'). A copy of that letter was extended to the plaintiff with a notation to him, at the bottom thereof, setting out the computation for RM22,778.70 as follows:

Tanggungan cukai tuan ialah:	
Baki Debit dalam akaun	= $8820.50
Cukai asal Tahun Taksiran 1981	= 12781.00
Cukai Tambahan Tahun Taksiran 80	= 663.60
Cukai Tambahan Tahun Taksiran 79	= 513.60
Jumlah cukai	22778.70

[4] On 30 May 1981 the second defendant also wrote to Eagle Aviation Services Sdn Bhd to inquire about the plaintiff's employment with the said company. It reads:

> Dari maklumat yang saya terima penama diatas akan bekerja disyarikat tuan. Sila sahkan pekara tersebut.
>
> 2. Jika benar, sila beritahu hal-hal dibawah:
>
> (1) tarikh mula bekerja;
>
> (2) jumlah gaji sebulan yang diterima;
>
> (3) jumlah saran-saraan lain yang diterima jika ada;
>
> (4) sila kemukakan borang I.T. 22 ke jabatan ini.
>
> Jawapan yang awal sangat dihargai.

[5] Eagle Aviation Services Sdn Bhd replied on 19 November 1981:

> Kami adalah *sebuah Syarikat yang baru* dan telah mula operasi kami sejak *1hb November, 1981*. Kini kami sukacita dapat tuan memberi kami Nombor Ingatan Majikan dan/atau borang-borang permohonan, jika ada, untuk membolehkan kami membuat pembayaran cukai pendapatan pekerja-pekerja di Syarikat kami secara ansuran.
>
> Sekian, diucapkan ribuan terima kasih.
>
> Yang benar
>
> Eagle Aviation Services Sdn. Berhad
>
> ... SD...
>
> R.Beadle
>
> Pengarah Urusan

(Emphasis added.)

[6] It is pertinent to note that the letter was signed by the plaintiff as 'Pengarah Urusan'.

[7] SEAH failed to remit the sum of RM22,778.70 to the second defendant in response to the second defendant's request on 6 April 1981. The plaintiff himself did not settle his personal income tax liability outstanding upon his termination of employment with SEAH, the computation of which sum he was reminded by way of the notation in the letter referred to above. In fact he refused to settle the said sum, taking a resolute and adamant stand that it was SEAH's responsibility to remit same out of his monies in SEAH'S hands. It was an unwise and ill advised move, on the part of the plaintiff.

[8] We are unanimous that personal income tax *is a personal liability* of an individual and *not a liability of an employer*. It is the individual who has been assessed the tax that must make the payment. Section 104 of the Act is a provision of the Act that *facilitates* recovery of tax from persons leaving Malaysia, whether upon cessation of employment or otherwise.

[9] Tax due and payable may be recovered by the government by civil proceedings as a debt due to the government under s 106(1) of the Act. In any proceedings under s 106, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under sub-ss 103(3), (4), (5), (6), (7) or (8).

[10] On 17 December 1981, the Assistant Director General of Income Tax, Hamzah HM Saman, the first appellant herein ('the first defendant'), issued a certificate under s 104 of the Act. He also sent the following letter dated 17 December 1981 to the plaintiff:

> This serves to inform you that this Department has issued to the *Ketua Polis Negara and Ketua Pengarah Imigresen Malaysia* a Certificate under Section 104 of the Income Tax Act 1967 requesting that you be prevented from leaving Malaysia until the sum of $*22,778.70* being your Income Tax liability is paid *or security furnished* to my satisfaction for the payment of the same.
>
> 2. An extract of Section104 and 115 of the said Act is enclosed for your information.
>
> 3. For your own convenience you are advised, when making payment of the above tax to obtain a Clearance Certificate from this Department, otherwise you may be prevented from leaving the country.
>
> (Emphasis added.)

[11] Section 104(1) of the Act reads:

> The Director General, where he is of the opinion that any person is about or likely to leave Malaysia *without paying* —
>
> (a) all tax payable by him (*whether or not due or due and payable*);
>
> (b) all sums payable by him under subsection 103(3), (4), (5), (6), (7) or (8); and
>
> (c) all debts payable by him under subsection ...
>
> may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable *or furnishes security* to the satisfaction of the Director General for their payment.
>
> (Emphasis added.)

[12] Section 115(1) and (2) of the Act reads:

> 115 (1) Any person who, knowing that a certificate has been issued in respect of him under section 104, voluntarily leaves or attempts to leave Malaysia without paying all the tax, sums and debts specified in the certificate or furnishing security to the satisfaction of the Director General for the payment thereof shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than two hundred ringgit and not more than two thousand ringgit or to imprisonment for a term not exceeding six months or to both.
>
> (2) A police officer or immigration officer may arrest without warrant any person whom he reasonably suspects to be committing or about to commit an offence under this section"

[13] We are unanimous that the certificate, issued on 17 December 1981 under s 104(1) of the Act by the first defendant, to prevent the plaintiff from leaving Malaysia without paying all tax payable by him as at 17 December 1981 or furnishing security for the payment of the said tax (RM22,778.70), was lawful. It was issued bona fide by the first defendant in the execution of his statutory duties and powers under the Act.

[14] The first defendant had acted neither arbitrarily nor unreasonably, on the facts relevant to the plaintiff's tax liability, when he issued the certificate on 17 December 1981. The pre-requisites for the issue of the certificate were patently satisfied, vide the Act. That the plaintiff was very likely to leave Malaysia without paying all the tax payable by him is evident from the facts and circumstances immediately preceding the issue of the certificate, because:

(a) as at 17 December 1981 the plaintiff had still not paid his tax liability of RM22,778.70, of which he had notice on *6 April 1981*;

(b) the plaintiff had ceased his employment with SEAH on *31 December 1980* and was unemployed;

(c) SEAH failed and/or refused to remit any portion of the plaintiff's money in its hands to the second defendant;

(d) the plaintiff had not obtained any work permit for employment by Eagle Aviation Services Sdn Bhd, his prospective new employer, as at 5 March 1981;

(e) the plaintiff is a British citizen; and

(f) the plaintiff is not a permanent resident of Malaysia.

[15] Pursuant to the certificate and directive issued by the first defendant on 17 December 1981, the plaintiff's passport No B128652 was seized on 3 April 1982 by one Inspector Azmy bin Mohd Yunus of the Setapak Police Station.

[16] By letter dated *20 February 1986*, using the letter-head of 'Eagle Aviation Services Sdn Bhd' and signing off the letter as 'managing director', the plaintiff wrote to the second defendant, as follows (so much as is relevant to this judgment is now reproduced):

> Re: Mr Ronald Beadle
>
> Income Tax File No.Sg. 528708-05
>
> *Income Tax Owing*
>
> ...
>
> With respect to our discussion for satisfactory security in the form of a Bank Guarantee for outstanding amount of tax owed, I am unfortunately, not in a position to raise a Bank Guarantee for this amount.
>
> I enclose photocopies of my last Bank Statements from both my Malaysian and U.K. accounts for your perusal.
>
> In view of my limited financial resources at this time, I should be very grateful if you would kindly consider the following alternative satisfactory for the *purpose of releasing my passport* to enable me to visit my parents in the United Kingdom (I have not seen them since 1975 and they are now too old to travel), and also *give me the freedom to travel on business* with respect to the Malaysian Companies of which I am the Managing Director and a shareholder.

SCHEDULE OF PAYMENT

...

...

...

I will not go into details as to why I have I have an outstanding tax bill ...

Over the last four years, since the impounding of my passport, it has proved very difficult to carry out my duties as Managing Director, as well as causing great inconvenience to the Police as on each occasion my Work Permit requires renewal, a Policeman must accompany me with my passport to the Immigration Department.

...

...

[17] The second defendant responded, by letter dated *6 March 1986*, informing the plaintiff that his proposal for settlement was unsatisfactory and that his passport would not be returned until acceptable arrangements are made. He was also notified that his outstanding tax liability now stood at RM39,581.48 and unless he settled the outstanding sum by *20 March 1986* court proceedings would be instituted to recover the same. The letter reads:

Merujuk kepada surat tuan bertarikh 20.2.1986, saya ingin memberitahu bahawa cadangan tuan menjelaskan cukai pendapatan adalah tidak memuaskan. Pasport tuan tidak boleh dikembalikan sehingga peraturan yang sesuai diterima. Berikut adalah kedudukan akaun tuan:

Cukai 1980		$ 9,621.20
Denda 10%		$ 962.12
$ 10583.32	|	
Denda 5%		$ 529.83 $11,112.98
Cukai Tambahan 1980		$ 663.60
Denda 10%		$ 66.36
$ 729.96	|	
Denda 5%		$ 36.49 $ 766.45
Cukai Tambahan 1979		$ 513.60
Denda 10%		$ 51.36
$ 564.96	|	
Denda 5%		$ 28.24 $ 593.20
Cukai 1981		$ 12,781.00
Denda 10%		$ 1,278.10
$14,059.10	|	
Denda 5%		$ 702.85 $14,762.05
Cukai pindaan 1982		$14,525.00

Denda 10%		$ 1,452.50
$ 15,977.50		
Denda 5%		$ 798.87
$16,776.56		
Bayaran		$ 14,885.00 $1,891.37
Cukai 1983		$ 5,574.50
Denda 10%		$ 557.45
$ 6,131.95		
Denda 5%		$ 306.59 $6438.54
Cukai 1984		$ 3,125.00
Denda 10%		$ 312.50
$ 3,437.50		
Denda 5%		$ 171.87 $3,609,37
Cukai 1985		$ 311.08
Denda 5%		$ 31.05
$ 342.13		
Denda 5%		$ 17.10 $ 407.52
$39,581.48		

Sila tuan membuat peraturan untuk menjelaskan cukai yang masih terhutang sebanyak $39,581.48 sebelum 20.3.1986. Jika gagal, tindakan Mahkamah akan diambil.

[18] By letter dated *20 March 1986* the plaintiff sent to the second defendant his personal cheque for the amount of RM10,447.23, in purported settlement of his tax. The letter, inter alia, set out:

> Subsequent to our last telephone conversation about the non–payment of my recent tax assessments, I have made the necessary financial arrangements to clear this debt with your Department.
>
> ...
>
> To clear this debt with your Department I enclose my personal cheque for the amount of RM10,447.23. I should be grateful if you would mail your official receipt to me in due course.
>
> ...
>
> It is now fast approaching four (4) years since I surrendered my Passport and your Department has neglected to either rectify the situation and return my Passport to me or take the necessary legal action against me to recover the amount of M$22,778.70 that I supposedly owe to your Department.
>
> In view of your Department's lack of action in this matter, I am taking my British International Passport out of the custody of the Police and if you still wish to impound my Passport, you will have to apply officially to the British High Commission.

...

...

[19] We observe, from the tone of this letter, a clear manifestation by the plaintiff of his continued defiance of the tax authorities and the tax laws, in respect of his tax liability.

[20] We are unanimous that the plaintiff was the author of his predicament with the tax authorities since 17 December 1981, by his adamant conduct to resist responsibility for his tax liabilities and his persistent attempt to shift liability to SEAH and/or the first/second defendants.

[21] On *31 March 1986* the second defendant informed the plaintiff that he *still owed* the sum of RM29,134.25 after deducting the sum of RM10,447,23 forwarded by him on 20 March 1986. He was told to make the payment expeditiously so that his passport could be released to him. The plaintiff failed to make the payment.

[22] On *27 May 1986* a writ of summons and a statement of claim for the sum of RM28,160.70 was issued against the plaintiff by the Government of Malaysia, the third appellant ('the third defendant') herein.

[23] On *5 May 1987* the plaintiff paid into court the sum of RM28,200.74 as security for the release of his passport pursuant to the order of court made on *24 March 1987* in saman permulaan No P 31–51 of 1986.

[24] On 4 April 1998 the second defendant wrote to the Ketua Polis Negara and Ketua Pengarah Imigresen, and copied to the plaintiff, with reference to the s 104 certificate issued on 17 December 1981, as follows:

> Saya merujuk kepada surat pejabat ini bertarikh 17 Disember,1981.
>
> 2. Oleh kerana tindakan keatas pembayar cukai telah diselesaikan maka arahan yang telah dikeluarkan itu tidaklah perlu dikuatkuasakan lagi dan sekiranya ada apa-apa dokumen perjalanan yang ada dalam simpanan tuan bolehlah dikembalikan kepadanya.
>
> ...
>
> ...

[25] It was only upon payment into court of the security deposit on *5 May 1987* that the plaintiff saw the light at the end of the tunnel to his woes over his passport. He could have achieved this as early as *17 December 1981* by furnishing the security to *second defendant* instead, as stipulated in the s 104

certificate, without the necessity of any application to court. The irony of it all is that he subsequently filed an action for damages in the sum of *RM2,935,568.65*, which for all intents and purposes, stems from the alleged unlawful retention of his passport for 5968 days by the second defendant. If the detention of his passport had been unlawful, the court would most certainly have ordered its release unconditionally.

[26] The plaintiff filed the civil suit, the subject matter of the current appeal, on 31 May 2000, against the defendants for alleged loss and damage suffered by him due to wrongful acts done or neglects or defaults committed as a public officer acting as an agent of or acting under the instructions of the third defendant.

[27] The alleged wrongful acts, neglects or defaults complained against the defendants were:

(a) the issuance of the certificate dated 17 December 1981 by the first defendant that the plaintiff was indebted in the sum of RM22,778.70 being his outstanding personal income tax;

(b) issuing a directive dated 17 December 1981 to the Ketua Polis Negara and Ketua Pengarah Imigresen under s 104 of the Act that the plaintiff be prevented from leaving Malaysia until the said sum of RM22,778.70 be paid or security be furnished to the satisfaction of the Director General of Income Tax;

(c) the seizure of the plaintiff's British passport on 3 April 1982 by the third defendant;

(d) the continuous refusal to withdraw the said certificate/directive and to release the passport; and

(e) retaining the plaintiff's passport for 5968 days and thereby wrongfully confining him to West Malaysia for that length of time.

[28] The trial judge entered judgment against the defendant for a total sum of RM3m in damages (RM2m as general damages and RM1m as exemplary damages) with interest and costs.

[29] The defendants are appealing against the said judgment and the plaintiff is cross-appealing on the trial judge's decision not to award the plaintiff's claim for his alleged loss of earning capacity as well as on the quantum of general damages.

[30] We are of the opinion that the only relevant issue for determination in this appeal before us is whether the first defendant had lawfully issued the certificate under s 104 of the Act on 17 December 1981.

[31] We are unanimous that the trial judge had seriously misdirected herself on the facts and law when she stated in her grounds of judgment:

(a) ... there is no basis in law and in fact for the first defendant to issue the certificate.

(b) ... that the first defendant had acted arbitrarily and unreasonably in issuing the certificate and that the action was not in consonant with the purpose of s 104.

(c) ... on the balance of probabilities I am satisfied that the defendants had acted unreasonably and improperly and was wrong in law and in fact to issue the certificate.

[32] We are unanimous, for reasons already stated earlier in this judgment, that the issue of the certificate by the first defendant was lawful. He has acted at all material times well within the framework and scheme of the Act. The certificate cannot be the subject matter of a challenge in this suit. The consequences flowing from the certificate were all foreseeable and easily avoided or overcome by the plaintiff from the very outset if he had had acted sensibly and rationally to his tax liabilities. The answer to his problem was laid bare in the certificate itself but the plaintiff chose to ignore it at his own peril. In the circumstances, damages, if any, must lay where it falls. The defendants are completely exonerated and are not liable at all.

[33] We are of the opinion the plaintiff's claim s in the civil suit are totally misconceived, exaggerated and ill perceived, with the intention of raking a windfall. In the circumstances of this case, damages are wholly unsustainable in law and in fact.

[34] In the absence of any special circumstances, we are unanimous that it is irregular and inappropriate to challenge the exercise of a statutory power by a public officer under s 104 of the Act, in collateral proceedings for damages by a writ action in 2000, without resort to any appropriate judicial review proceedings relating to the certificate promptly in 1981/1982, within the time frame stipulated in the Rules of the High Court 1980.

[35] In the upshot, the defendants are not liable for *any damages* to the plaintiff. The appeal is accordingly allowed with costs fixed at RM5000. The respondent's cross appeal is dismissed with no order as to costs.

Appellants' appeal allowed with costs and the respondent's cross-appeal dismissed with no order as to costs.

Reported by Andrew Christopher Simon